No. 21-55356

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEX MORGAN, *et al.*,

Plaintiffs-Appellants,

v.

UNITED STATES SOCCER FEDERATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 19-cv-1717
Hon. R. Gary Klausner, U.S. District Judge

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF REVERSAL OF THE DISTRICT COURT'S DECISION

Harold Craig Becker
Matthew J. Ginsburg
K. Alexandra Roe
Yona Rozen
Patrick J. Foote
815 Sixteenth Street NW
Washington, DC 20006
Tel.: (202) 637-5397
mginsburg@aflcio.org

Counsel for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby makes the following disclosures:

The AFL-CIO is an unincorporated association of 55 national and international labor unions representing over 12 million working men and women. The AFL-CIO has no parent corporation and no publicly-traded corporation has an ownership interest in it.

/s/ Matthew J. Ginsburg
Matthew J. Ginsburg

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INTEREST OF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 55 national and international labor organizations with a total membership of over 12 million working men and women.[1] As such, the AFL-CIO is not only the largest labor federation in the United States, it is the nation's largest organization of working women, with women expected to constitute over half of union membership by 2025.

The AFL-CIO has long fought for gender equality in the workplace, recognizing that when women's work is undervalued, the effects ripple widely. The AFL-CIO Charter of Rights of Working Women states, in part:

> WOMEN WORK EVERY DAY. No matter where they live, their economic activity is vital to the economy and society at large, their communities, their families and their personal autonomy and growth . . . .
>
> [T]he AFL-CIO will do all in its power to secure for women the rights set down in this Charter[, including] . . .
>
> Equal pay for work of equal value.[2]

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[1] Counsel for the Plaintiffs-Appellants and counsel for the Defendant-Appellee have each consented to the filing of this *amicus* brief. No party's counsel has authored this brief in whole or in part, no party or party's counsel has contributed money that was intended to fund preparing or submitting this brief, and no person, other than the AFL-CIO, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

[2] *Charter of Rights of Working Women*, AFL-CIO, https://aflcio.org/about/leadership/statements/charter-rights-working-women (March 5, 2009).

As a federation of labor unions, the AFL-CIO's affiliate unions endeavor to ensure equal pay for equal work by, among other actions, negotiating collective bargaining agreements that provide uniform standards for all workers regardless of their gender. While the AFL-CIO views collective bargaining as one of the most effective ways to achieve pay equity, it recognizes that without enforcement of laws such as the Equal Pay Act and Title VII, that goal will remain outside our grasp. Women rely on a combination of collective action, litigation, and the illustrative actions of extraordinary individual and group achievement to accomplish equal pay and fair treatment. The members of the U.S. Women's National Team are among those whose undeniable excellence helps overcome stereotypes and unfair prejudice, creating a fairer environment for those who follow, be they world champion athletes or essential workers. The players, like all women workers, deserve equal pay and equal treatment.

SUMMARY OF ARGUMENT

In granting summary judgment to the United States Soccer Federation, Inc. (USSF) on the players' Equal Pay Act (EPA) and Title VII compensation claims, the District Court significantly relied, in ways express and implied, on the fact that the compensation at issue was negotiated by the U.S. Women's National Team (USWNT) players through collective bargaining. The District Court's reliance on that fact was misplaced for several reasons.

First, while it is true that collective bargaining has a general tendency to narrow the wage gap between men and women, that effect is much less clear in a case such as this one, where USWNT players and players for the U.S. Men's National Team (USMNT) bargain separate agreements with their shared employer. Put simply, the USWNT Players Association has no control over the terms negotiated with the USSF by the USMNT players' union. Therefore, the equity effect that typically results from negotiating uniform classifications and rates for female and male workers in the same bargaining unit is not present here.

Next, it is fundamental to the practice of collective bargaining that neither party can simply impose its preferred contract terms. Rather, the end result is almost always a compromise between labor and management. As a result, the fact that the USWNT Players Association agreed to the compensation contained in the collective bargaining agreement as the best achievable outcome at the time the contract was negotiated does not mean that that agreement is lawful under the EPA and Title VII, nor does the union's agreement waive the statutory rights of individual players to insist on equal pay.

Finally, the District Court suggested that the fact that the USWNT players agreed to a different compensation structure than the USMNT players – a structure that includes an annual salary for some players – meant that the overall economic value of the two agreements could not be meaningfully compared by the jury. That

suggestion was incorrect, as well-established labor relations practice makes clear. Labor negotiators and arbitrators routinely "cost out" or ascertain the value of alternative compensation proposals or provisions, even when those provisions are structured in significantly different ways, *e.g.*, a fixed hourly wage as compared to a productivity-based rate. The District Court's implicit conclusion that the compensation provisions here could not reasonably be compared – and, therefore, that there was no genuine dispute of fact that the USWNT players were paid at a lower rate than the USMNT players – was contrary to this established labor relations practice.

ARGUMENT

I. Although Union Representation and Collective Bargaining Generally Narrow the Gender Wage Gap, This Equity Effect Is Far Less Clear Where Women and Men Bargain in Separate Units

Union representation and collective bargaining generally serve to narrow the wage gap between men and women, although certainly they have not fully eliminated that often unlawful inequity. The positive effect of collective bargaining largely results from bargaining for equal pay for women and men within a bargaining unit, as the union demands uniform standards for all workers regardless of gender and then enforces those standards through the grievance and arbitration process. In a case such as this one – where players on the USWNT are represented by a different union in a separate bargaining unit from players on the

USMNT in their negotiations with the USSF – collective bargaining is far less likely to close the gender wage gap for the simple reason that the USWNT Players Association does not influence, much less control, the terms and conditions that the USMNT players' union negotiates with their shared employer.

It is important to begin by recognizing that, as a general matter, unions and collective bargaining do narrow the gender wage gap. Working women in unions are paid 94 cents, on average, for every dollar paid to unionized working men, compared with 78 cents on the dollar for non-union women as a share of non-union men's dollar. Elise Gould & Celine McNicholas, *Unions Help Narrow the Gender Wage Gap,* Econ. Pol'y Inst. Working Econs. Blog (Apr. 3, 2017, 8:00 AM), https://www.epi.org/blog/unions-help-narrow-the-gender-wage-gap/. *See also* Katherine Gallagher Robbins & Andrea Johnson, *Union Membership is Critical for Equal Pay*, Nat'l Women's Law Ctr. (Feb. 2016), https://nwlc.org/wp-content/uploads/2015/02/Union-Membership-is-Critical-for-Equal-Pay.pdf (finding gender wage gap for union members in 2016 to be less than half the size of wage gap for non-union workers).

For example, two scholars who examined "whether collective bargaining coverage narrows the gender wage gap among manufacturing employees," concluded:

> Our findings provide compelling evidence that the estimated pay disparity between men and women is smaller in unionized establishments in . . . a large portion of the manufacturing workforce. That is, blue-collar women generally benefit from working in unionized plants.

Marta M. Elvira & Ishak Saporta, *How Does Collective Bargaining Affect the Gender Pay Gap?*, 28 Work & Occupations 469, 481-82 (2001).

Conversely, in Wisconsin, when then-Governor Scott Walker signed Act 10, which allowed teacher wages to be set by individual bargaining rather than collective bargaining, the result was an *increase* in the gender pay gap:

> [W]e analyze the wages of public-school teachers in Wisconsin, where a 2011 reform allowed school districts to set teachers' pay more flexibly and engage in individual negotiations. . . . [W]e show that flexible pay increased the gender pay gap among teachers with the same credentials. This gap is larger for younger teachers.

Barbara Biasi & Heather Sarsons, *Flexible Wages, Bargaining, and the Gender Gap* 2 (Nat'l Bureau of Econ. Research Working Paper No. 27894, Oct. 2020), https://www.nber.org/papers/w27894.

This research demonstrates that the primary reason why collective bargaining closes the gender pay gap is that such bargaining has the effect of ensuring equal treatment of men and women *within* bargaining units. That is so because collective bargaining agreements ordinarily create workplace policies such as standardized wage rates, pay transparency, and grievance procedures that, in their operation, tend to diminish gender pay disparity. Gould & McNicholas, *Unions Help Narrow the Gender Wage Gap*. Unionization thus tends to "reduce

wage dispersion among employees covered by the same collective bargaining agreement" by "reduc[ing] the wage gap for women working alongside men in the same establishments and jobs." Elvira & Saporta, *How Does Collective Bargaining Affect the Gender Pay Gap?*, at 471.

In a case such as this one, in contrast, where women and men are represented by different unions in separate bargaining units, collective bargaining is less likely to have such a significant equalizing effect. *See id.* at 476, 482 (finding that collective bargaining had less effect on the gender gap in workplaces composed almost entirely of women). Women workers obviously still benefit by joining together in a union to bargain for better pay and working conditions from their employer. But the members of the USWNT Players Association have no control over the terms and conditions that the USMNT players' union separately bargains with the USSF. 5-ER-1069-70. As a result, the potential for "wage dispersion" between female players and male players persists, despite the fact that both groups are unionized and bargain with the same employer.

II. Because Collective Bargaining Involves Negotiation and Compromise, A Union's Agreement to a Compensation System Does Not Mean that System is Lawful Under the EPA and Title VII, Nor Does the Union's Agreement Waive Individual Employees' Rights Under Those Laws

The District Court seemed to suggest in its decision that the USWNT Players Association's agreement to a contract whose economic terms differed from the men's agreement somehow provides the USSF with a defense in this case or served to waive individual employees' rights under the EPA and Title VII. Those suggestions reflect a basic misunderstanding of the collective bargaining process. It goes without saying that, regardless of the specific bargaining arrangement at issue, no union can eliminate pay disparities, even unlawful pay disparities, without cooperation from the employer. Although the union can propose equal pay for women workers in collective bargaining, it cannot achieve that result without the employer's assent.[3] Thus, if the best rate of compensation the union is able to achieve for its members still violates the EPA or Title VII, it is well-established that the union's agreement to the contract does not provide the employer with a defense to individual employees' pay discrimination claims or waive individual employees' statutory rights.

The federal law governing the bargaining at issue in this case, the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*, expressly states that an

[3] For example, the Plaintiffs' Opening Brief cites to evidence that, in collective bargaining, "the Federation refused to offer the women the same *dollar*

employer's obligation to bargain with a union selected by a majority of its employees "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). Moreover, if the parties reach an impasse in bargaining, the employer is privileged to unilaterally change employees' terms of employment. *Am. Fed'n of Television & Radio Artists, Kansas City Loc. v. NLRB,* 395 F.2d 622, 624 (D.C. Cir. 1968). While employees may lawfully strike to seek to convince their employer to come to terms, for example, over equalizing rates of pay, the employer need not pay such striking employees, can cancel their health insurance, and can permanently replace them. *See Ace Tank & Heater Co*., 167 N.L.R.B. 663, 664 (1967); *NLRB v. Mackay Radio & Tel. Co*., 304 U.S. 333, 347 (1938). The employer can also lock out employees to pressure them to give up on their demands, *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965), a tactic that has been frequently used by employers in professional sports. *See* Dave Zirin, *Meet the Lockout Lawyers Destroying Sports*, The Nation (Oct. 15, 2012), https://www.thenation.com/article/archive/meet-lockout-lawyers-destroying-sports/.

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amounts as the men for appearance fees and performance bonuses." Opening Br. for Plaintiffs-Appellants at 12, *Morgan v. U.S. Soccer Fed'n*, No. 21-55356 (9th Cir. July 23, 2021) (Pl. Br.).

Thus, while the USWNT Players Association and the USSF ultimately did reach an agreement over compensation, the union entered into that agreement in the shadow of this body of law requiring compromise. As the Plaintiffs' Opening Brief aptly states, the women's "union agreed to the best deal that could be negotiated." Pl. Br. 12. *Cf. Laffey v. N.W. Airlines, Inc.*, 567 F.2d 429, 437-38 (D.C. Cir. 1976) (explaining that, "[d]uring negotiations on the issue [of permitting the all-female stewardess workforce to bid for previously all-male purser positions], N[orthwest Airlines] . . . rejected an additional union proposal that stewardesses . . . be allowed to progress to purser slots according to seniority, stating that the company 'prefers males and intends to have them.'" The airline instead agreed to hire women for purser positions solely at the company's discretion, leading to only one woman being hired as a purser.), abrogated on other grounds by *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). However, the union's ultimate agreement to the deal plainly does not mean that that the deal was lawful under the EPA or Title VII. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 208-09 (1974) (finding unequal pay rates contained in a collective bargaining agreement to be unlawful under the EPA); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 926 (9th Cir. 1982) ("An employer-union agreement permitting the employer to discriminate is not immune to . . . discrimination claims.").

Likewise, it is clear that a union's agreement to employment terms in a collective bargaining agreement does not waive the right of individual employees to bring statutory claims challenging those terms as unlawful. *See Laffey*, 567 F.2d at 447 ("[U]nion activity cannot strip individual employees of the opportunity to seek vindication of their statutory entitlements in court. Rights established under Title VII and the Equal Pay Act are not rights which can be bargained away either by a union, by an employer, or by both acting in concert.") (citations and quotation marks omitted); *Owens-Illinois*, 665 F.2d at 926 (stating same).[4] The Equal Employment Opportunity Commission has said so explicitly. *See* 29 C.F.R. § 1620.23 ("Any and all provisions in a collective bargaining agreement which provide unequal rates of pay in conflict with the requirements of the EPA are null and void and of no effect.").

[4] This is an entirely different question from that addressed by *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009), "whether a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under [a federal anti-discrimination statute] is enforceable." There is no allegation in this case that the collective bargaining agreement required the players to arbitrate their ADEA and Title VII claims.

III. Comparing the Cost or Value of Differently-Structured Compensation Systems is Commonplace in Labor Relations Practice; the District Court Erred in Its Suggestion that the Compensation Systems Contained in the USWNT and USMNT Agreements Could Not Be Meaningfully Compared by A Jury

Although, as the District Court noted, comparing the cost and value of economic terms in collective bargaining agreements can be complex, negotiators and factfinders in a variety of labor relations settings routinely undertake such comparisons. For that reason, labor relations practitioners and arbitrators have developed methodologies for "costing out" contract proposals and comparing different collectively-bargained economic provisions. When viewed against the backdrop of these established labor relations practices for comparing disparate contract provisions, it is clear that the relative values of the compensation contained in the USWNT and USMNT contracts at issue in this case was a question of material fact over which there was a genuine dispute. The District Court's determination to the contrary, and its grant of summary judgment to USSF on this basis, was error.

Rather than permit all the evidence to be presented and weighed at trial, the District Court performed what can only be described as a back-of-the-envelope calculation in comparing the compensation paid to players on the USWNT and the USMNT:

> It is undisputed that, during the class period, the WNT played 111 total games and made $24.5 million overall, averaging $220,747 per

> game. By contrast, the MNT played 87 total games and made $18.5 million overall, averaging $212,639 per game. Based on this evidence, it appears that the WNT did not make more money than the MNT solely because they played more games.

1-ER-22. That conclusion, which disregarded the important role that the USWNT's greater success played in determining the women players' overall compensation, was clearly erroneous.

Evaluating or "costing out" the value of economic proposals is fundamental to the practice of collective bargaining. *See* United Steelworkers, *Contract Costing: Information Requests, Labor Costs, and Estimating Cost Items*;[5] International Brotherhood of Teamsters, *A Guide to Costing Labor Contracts*;[6] American Federation of State, County, and Municipal Employees, *Developing and Justifying Contract Proposals: A Guide for AFSCME Negotiations*.[7] For example, it is not unusual for one side in a negotiation to propose compensation based on an hourly wage and the other side a productivity- or merit-based compensation system. *See*, *e.g.*, *Colorado Ute Electric Association*, 295 N.L.R.B. 607, 607-08 (1989) (describing one example of such bargaining), *enforcement denied*, 939 F.2d 1392 (10th Cir. 1991). Effective bargaining depends on the ability to translate

[5] http://images.usw.org/conv2011/convention2011/cbrb/Contract%20Costing.pdf (last visited July 29, 2021).

[6] https://teamster.org/wp-content/uploads/2018/12/revsdcontractcosting2017.pdf (last visited July 29, 2021).

[7] https://afscmestaff.org/bargaining/bargaining-toolkit/getting-started/contract-proposals/ (last visited July 29, 2021).

each proposal into a common dollar value so the two proposals can be compared and a compromise can be reached.

Relatedly, under collective bargaining systems that require bargaining impasses to be resolved through interest arbitration rather than strikes and lockouts, as is common in the public sector, the terms of comparable agreements are often a factor the arbitrator must consider in setting contract terms. *See, e.g.*, Wis. Stat. §§ 111.77(6)(bm)(4)(a) & (b) ("the arbitrator shall give weight to . . . [c]omparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services."); Neb. Rev. Stat. § 48-818(1) (when conducting interest arbitration, the Commission of Industrial Relations shall "establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions."). The arbitrator's ability to draw "comparisons with other employee groups," even when those other groups have differently-structured compensation systems, is thus key to "the integrity and usefulness of the [interest arbitration] process." Greg Dell'omo, *Wage Disputes in Interest Arbitration: Arbitrators Weigh Criteria*, The Arbitration Journal Vol. 44, No. 2 at 4 (1989).

Along broadly similar lines, collective bargaining agreements routinely contain "most-favored-nation" clauses that prevent a union from agreeing to more favorable terms with another employer in the same industry. *See*, *e.g.*, *Food Drivers, Helpers & Warehousemen Emps., Loc. 500*, 340 N.L.R.B. 251, 252 (2003) (concerning a dispute over such a clause). An arbitrator faced with a question of whether the union has violated a most-favored-nation clause must compare the provisions of the two collective bargaining agreements to determine whether the union has treated one employer more favorably, an inquiry that often requires comparing the value of differently-structured contract provisions. *See*, *e.g.*, *Prate Installations, Inc. v. Chi. Reg. Council of Carpenters*, 607 F.3d 467, 469 (7th Cir. 2010) (reviewing labor arbitrator's award based on interpretation of most-favored-nation clause, where "Union allegedly required Prate to pay hourly wages while allowing Prate's competitors to pay their union workers on a piecework basis").

This process of costing out of bargaining proposals and comparing contracts' economic provisions can be complex. *See generally* Joseph Antos, *Analysis of Labor Cost: Data Concepts and Sources, in* The Measurement of Labor Cost 153, 154-60 (Jack E. Triplett ed., 1983). For this reason, in the AFL-CIO's experience, unions and employers frequently use labor economists as experts in negotiations and arbitrations. Not surprisingly, as was the case here, those experts

often disagree on their ultimate conclusions based on the assumptions underlying those conclusions. *See generally* Carl Levine, *How to Cost Out Your Contract! The Mathematics of Collective Bargaining*, J. Collective Bargaining in the Acad. 1-2 (2011). An arbitrator or other factfinder must ultimately determine which of the expert's overall analyses is more persuasive in order to determine a provision's total value.

Determining whether men and women are being paid equally for equal work under the EPA and Title VII requires no less searching analysis. The District Court's perfunctory conclusion regarding the comparative value of the compensation provisions in the USWNT collective bargaining agreement and the USMNT contract disregarded established labor relations practices for determining the value of such provisions. Clearly, the relative values of the contracts were a question of material fact for which there was a genuine dispute. The District Court erred by not permitting this conflicting evidence to be considered by a jury.

IV. Plaintiffs Persuasively Explain How the District Court Erred in Granting Summary Judgment on Both Claims

Finally, Plaintiffs in their Opening Brief persuasively explain how the District Court erred in granting summary judgment on both claims. Because we agree with Plaintiffs' arguments, we do not reiterate them here, but rather simply point out a few additional reasons why reversal and remand is merited.

Plaintiffs persuasively explain why the District Court erred in granting summary judgment on their EPA claim. Stated simply, the District Court compared apples to oranges or, perhaps more accurately, given the USWNT's long history of success, U.S. Extra Fancy apples to oranges. *See Apple Grades & Standards*, U.S. Dep't of Agric., https://www.ams.usda.gov/grades-standards/apple-grades-standards (last visited July 29, 2021). The District Court's simple comparison of total earnings and average earnings per game simply ignores the women's vastly superior performance. 2-ER-97-98. The District Court stated that "it is not 'absurd' to consider the total compensation received by the players." 1-ER-22. But it is inappropriate to consider only total and average compensation and not the performance component of the teams' compensation in considering at the summary judgment stage whether there was a genuine dispute of fact material to the claim that the women were paid at a rate less than the rate paid the men for work requiring equal skill, effort and responsibility. 2-ER-101-04. The District Court focused only on "whether [the men] were paid more than [women] players." 1-ER-20. But as Plaintiffs make clear in their Opening Brief, that is simply not the legally-relevant question under the EPA. Pl. Br. 34-35.

Plaintiffs also persuasively explain why the District Court erred in granting summary judgment on their Title VII claim. First, of course, because the District Court's conclusion concerning the Title VII claim rested entirely on its erroneous

conclusion concerning the EPA claim, if this Court reverses the former, it must reverse the latter.

But even assuming the District Court was correct in granting summary judgment on the EPA claim, the two claims have different elements, and it is plain that even women who are paid more in total than men can state a claim under Title VII if they would have received additional compensation of any kind, for example, greater appearance fees or bonuses, but for their sex. *Maxwell v. City of Tucson*, 803 F.2d 444, 446 n.5 (9th Cir. 1986).

Finally, the direct evidence of discriminatory motive offered by the plaintiffs was surely sufficient to require trial of the Title VII claim. 4-ER-534-35, 5-ER-896, 5-ER-906, 5-ER-1036. The District Court dismissed the evidence by stating, "That USSF agents said WNT players are paid less *does not make it true*." 1-ER-24 (emphasis added). But that is not the standard at the summary judgment stage. Those statements at least raise a genuine question of fact concerning whether the women were paid less due to their sex, a question that could not be resolved at summary judgment. Moreover, the District Court improperly weighed and then dismissed each of the multiple pieces of direct evidence of discrimination. That was also inappropriate at the summary judgment stage. Finally, the District Court's own finding that there was sufficient evidence of discrimination in working conditions, for example, travel arrangement and expenditures, and its

finding that the non-discriminatory rationale offered by the employer was "'so weak'" and 'implausible'" that a reasonable fact finder could find that it was "'not an honestly held belief but rather was subterfuge for discrimination,'" 1-ER-35, should also have been considered in assessing the evidence of discrimination in compensation.

The Plaintiffs have fully and persuasively demonstrated how the District Court erred in granting summary judgment on both claims.

CONCLUSION

The AFL-CIO and its affiliated unions are committed to seeking equal treatment of employees regardless of sex. But the ideals embraced by Congress in both the Equal Pay Act and Title VII of the 1964 Civil Rights Act can only be obtained if all institutions play the roles assigned to them by Congress, including the courts through the enforcement of those landmark laws.

For all of the reasons stated herein, this Court should reverse the grant of summary judgment in favor of the USSF and remand for further proceedings.

Respectfully submitted,

/s/ Matthew J. Ginsburg

Harold Craig Becker
Matthew J. Ginsburg
K. Alexandra Roe
Yona Rozen
Patrick J. Foote
815 Sixteenth Street NW
Washington, DC 20006
Tel.: (202) 637-5397
mginsburg@aflcio.org

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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Signature __/s/ Matthew J. Ginsburg_____ **Date** July 30, 2021

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 30, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Matthew J. Ginsburg
Matthew J. Ginsburg